

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



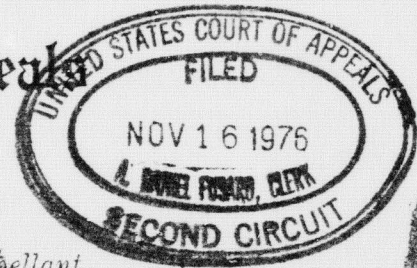


# 76-7338

To be argued by  
JOHN ENDICOTT

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IN THE  
**United States Court of Appeals**  
For the Second Circuit



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EDWARD ALEXANIAN,  
*Plaintiff-Appellant,*  
*against*

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION, *et al.*,  
*Defendants-Appellees.*

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On Appeal from the United States District Court  
for the Southern District of New York

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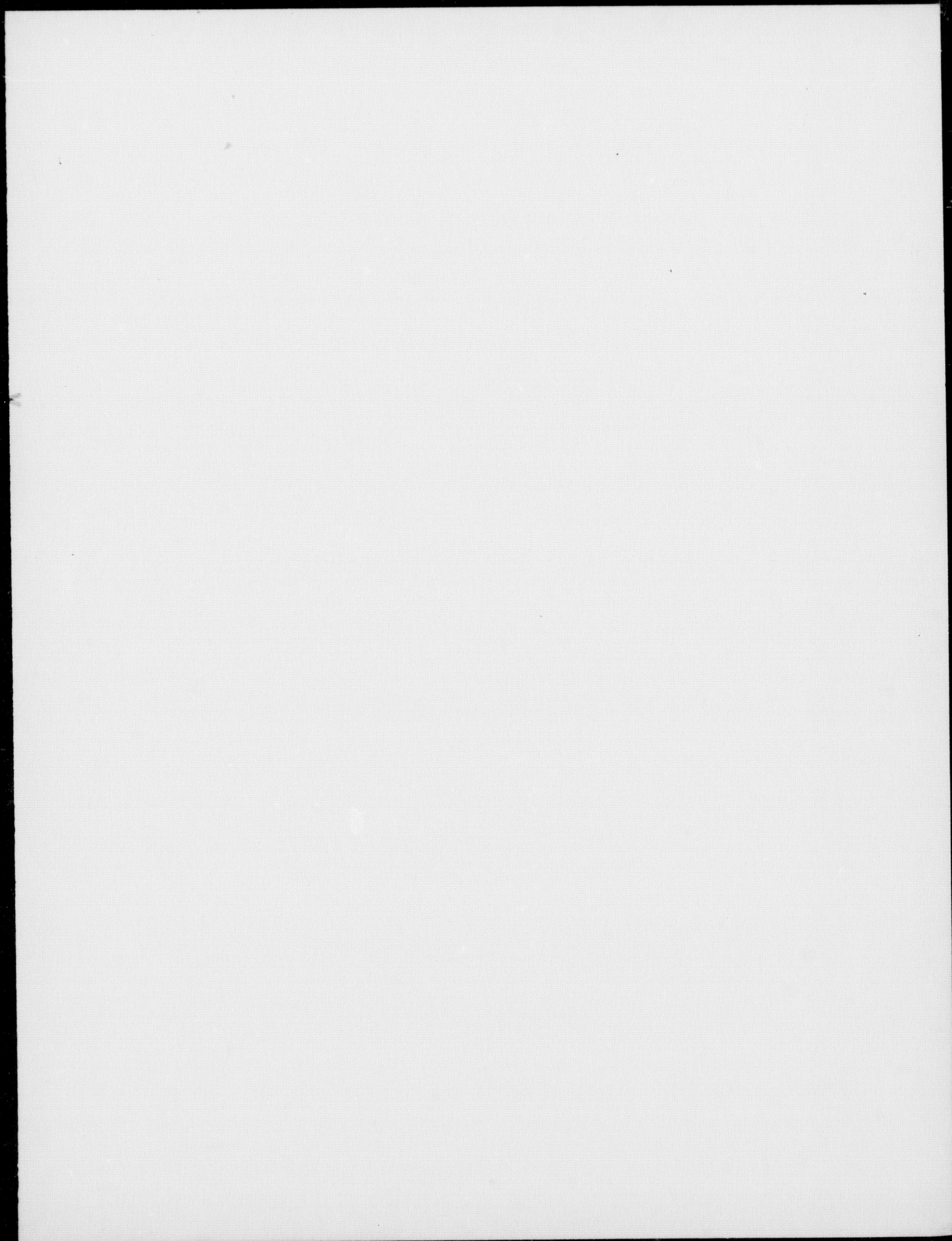
BRIEF FOR DEFENDANTS-APPELLEES, NEW YORK  
STATE URBAN DEVELOPMENT CORPORATION,  
EDWARD LOGUE, ROBERT McCABE, JOHN  
BURNETT, DAVID OZERKIS, JOSEPH  
FIOCCA, WILLIAM HAYDEN, ROBERT  
HAZEN, ROBERT GERMANO AND  
PHILIP SALOMINE

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November 16, 1976

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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Docket No. 76-7338  
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EDWARD M. ALEXANIAN,

Plaintiff-Appellant,

-against-

NEW YORK STATE URBAN DEVELOPMENT  
CORPORATION, et. al.,

Defendants-Appellees.

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On Appeal From the United States District  
Court for the Southern District of New York  
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BRIEF FOR DEFENDANTS-APPELLEES, NEW YORK STATE URBAN  
DEVELOPMENT CORPORATION, EDWARD LOGUE, ROBERT MC CABE,  
JOHN BURNETT, DAVID OZERKIS, JOSEPH FIOCCA, WILLIAM HAYDEN,  
ROBERT HAZEN, ROBERT GERMANO AND PHILIP SALOMINE

Preliminary Statement

Appellant pro se Edward M. Alexanian appeals  
from the June 18, 1976 Memorandum and Order of the Hon.  
Kevin T. Duffy, United States District Court Judge, dis-  
missing Mr. Alexanian's complaint on the ground that its  
"allegations do not make out any justiciable cause of action."



Mr. Alexanian's action was dismissed on the basis of motions pursuant to Fed.R.Civ.P. 12(b) which were made on behalf of the following defendants-appellees: (a) the City of New York (the "City") and certain of its employees and officials, (b) the law firm of Debevoise, Plimpton, Lyons & Gates, Standish F. Medina, Jr., a member of the firm, and Joseph H. Schnabel, its managing clerk (the "DPL&G defendants"), and (c) the New York State Urban Development Corporation ("UDC"), and the following present and former UDC employees: Edward Logue, Robert McCabe, John Burnett, David Ozerkis, Joseph Fiocca, William Hayden, Robert Hazen, Robert Germano and Philip Salomine. This brief is submitted on behalf of UDC and the above-named present and former UDC employees (the "UDC defendants").

#### Questions Presented

1. Was the District Court correct in holding that "the allegations [of the Complaint] do not make out any justiciable cause of action" where there was no diversity of citizenship between the plaintiff and defendants and where the Complaint, apart from purported claims sounding in tort and contract, alleged merely that a state trial court had made incorrect decisions on contested issues of fact?

2. Where plaintiff has unsuccessfully asserted in prior litigations many of the claims now raised in the Complaint, and where those claims against the UDC defendants relate to events and actions which occurred at least three years prior to the filing of the Complaint, are those claims barred by the doctrines of res judicata and collateral estoppel, as well as by the applicable statutes of limitations?

The UDC defendants submit that both questions must be answered in the affirmative. The District Court answered the first question in the affirmative, and did not expressly reach the second question.

#### Statement of the Case

Mr. Alexanian brought this pro se action in an attempt to have the federal courts review certain interlocutory orders which were issued by the lower New York State courts and which led to his eviction from real property located in the Bronx. He also sought monetary damages from all those who, in his opinion, were responsible for his eviction. The Complaint named some 47 defendants-- including Vice President (then Governor) Rockefeller, the City, Mr. Alexanian's own lawyer, a justice of the



New York Supreme Court, the Parks Commission, a number of police officers, the warden of the City jail, and several construction companies--and included charges of breach of contract, fraud, defamation, and deprivation of Constitutional rights.

Mr. Alexanian was, prior to 1973, the owner and operator of a scrap yard located in the Bronx on premises owned by the City. Complaint, ¶5; Affidavit of Standish F. Medina, Jr., sworn to May 19, 1976 ("Medina Affidavit"), ¶3.\*

UDC is a governmental agency and political subdivision of the State of New York. New York Unconsolidated Laws §6254(1). The individual UDC defendants are present and former UDC employees. Affidavit of Clifford P. Case, III, sworn to May 27, 1976 ("Case Affidavit"), ¶2. Only one of the individual UDC defendants, David Ozerkis, was served with process. Id.

The other facts pertinent to this appeal

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\* Pursuant to the order of this Court dated September 13, 1976, the appendix to Mr. Alexanian's brief contains only the docket entries in the District Court and the Memorandum and Order of that Court dated June 18, 1976. Thus references in this brief will be made directly to the record, in accordance with Rule 28(e) of the Federal Rules of Appellate Procedure.

are set forth in the Statement of the Case in the brief submitted on behalf of the DPL&G defendants. During the period relevant to this action, DPL&G represented UDC in its litigation with Mr. Alexanian. In accordance with Rule 28(i) of the Federal Rules of Appellate Procedure, the UDC defendants adopt by reference the clear and comprehensive Statement of the Case contained in the DPL&G defendants' brief.

#### Argument

The clear purpose of the Complaint and of this appeal from its dismissal is to engage UDC and the other defendants in frivolous, repetitious, and vexatious litigation of issues determined years ago.

This action constitutes also an unwarranted renewed imposition upon the District Court and upon this Court. Nevertheless, the District Court

" . . . spent many hours reviewing the 293 paragraph document entitled 'Complaint', particularly with a view to interpreting it in the most favorable light since the plaintiff is appearing pro se." Memorandum and Order of Hon. Kevin T. Duffy, dated June 18, 1976.

At the end of this lengthy review, Judge Duffy correctly concluded that "the allegations do not make out any justiciable cause of action" against the UDC defendants.



I. THERE IS NO FEDERAL JURISDICTION APPLICABLE TO PLAINTIFF'S CLAIMS

A. There is No Diversity of Citizenship Between Plaintiff and UDC

Mr. Alexanian alleged in his Complaint that he is an "American Citizen" (Complaint, ¶1), but not that he is a citizen of any state. American citizenship in itself, without state citizenship, does not support diversity jurisdiction. See 1 Moore's Federal Practice ¶0.74[5] (1975). Assuming that he is in fact a resident of the State of New York - on the final page of the complaint Mr. Alexanian gives his mailing address as care of a New York address - there is still no diversity of citizenship jurisdiction since defendant UDC also is a citizen of the State of New York. Case Affidavit, ¶1. Furthermore, the inclusion as defendants of "several John Does [who] are residents of States, other than the State of New York" (Complaint, ¶2) "casts no magical spell on a complaint otherwise lacking in diversity jurisdiction." Fifty Associates v. Prudential Insurance Co. of America, 446 F.2d 1187, 1191 (9th Cir. 1970).

Nor can federal jurisdiction be premised upon Mr. Alexanian's cryptic reference to "conflict of interest."

While he presumably thereby refers to his claim that he should not be required to litigate in the State courts because they have consistently ruled against him, Mr. Alexanian has already been informed by his former attorney, by Judge Brieant, and by this Court that this circumstance provides no basis for federal jurisdiction. Medina Affidavit, ¶17; Complaint, ¶¶116-17.

B. The Complaint States No Claim Arising Under Federal Law

Mr. Alexanian has alleged no cause of action under federal law. Nor can the Complaint be construed as stating any federal cause of action, since there is no federal law broad enough to allow a plaintiff to escape a motion to dismiss by alleging merely that a defendant has deprived him of his constitutional rights. Powell v. Jarvis, 460 F.2d 551 (2d Cir. 1972). In Powell, plaintiff sought damages in federal district court against a detective and a witness at his criminal trial, alleging that they had given perjured evidence against him, and that they had "conspired from the very beginning to deprive [him] of his civil and constitutional rights." The court of appeals held that the complaint was properly dismissed as a "hodgepodge of vague and conclusory allegations."



460 F.2d at 553. See also Hahn v. Sargent, 388 F.Supp. 445 (D.Mass. 1975).

In addition, as set forth in the Statement of the Case in the brief submitted on behalf of the DPL&G defendants, Mr. Alexanian has asserted, with no success, in the New York State courts many of the claims on which he now seeks a further hearing in federal court. Federal jurisdiction is not designed, however, to provide collateral review of state court proceedings, or "to substitute for the right of appeal, or to attack final judgments of a state court and relitigate that which could have been decided in the state proceedings." Meyer v. Lavelle, 389 F.Supp. 972, 976 (E.D. Pa. 1975).

Mr. Alexanian received due notice of all such state court proceedings. Medina Affidavit, ¶¶ 13, 19. The complaint itself indicates that plaintiff on all occasions received actual and timely notice of such proceedings, despite plaintiff's objection to the manner of service.

Even if plaintiff had alleged a cause of action under federal law (which he has not) his claims would be barred by reason of the following:

- (1) UDC, as a "political subdivision" of the

State of New York [Unconsolidated Laws §6254(1)], would be immune from such suit, see Moore v. County of Alameda, 411 U.S. 693, 710 (1973), and Edelman v. Jordan, 415 U.S. 651 (1974); and

(2) the applicable limitation period of three years (N.Y.Civ.Prac. L.R. 214(2)), see, e.g., Kaiser v. Cahn, 510 F.2d 282, 284 (2d Cir. 1974), and Swan v. Board of Higher Education, 319 F.2d 56, 59 (2d Cir. 1963), has run on plaintiff's purported claims.

Finally, we note that, of the nine UDC defendants who are individuals, only David Ozerkis was ever served with process. Case Affidavit, ¶3. Accordingly, the District Court lacked personal jurisdiction over the eight other individual UDC defendants. See Rule 4(d)(1) of the Federal Rules of Civil Procedure.

## II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Apart from Mr. Alexanian's conclusory and totally unfounded allegations of deprivation of constitutional rights, the complaint sounds essentially in malicious prosecution and defamation. Neither cause



of action is maintainable in Federal court, as the District Judge implicitly ruled. An action for malicious prosecution does not lie unless and until the claimed malicious suit has been terminated favorably to the claimant, Rosemont Enterprises, Inc. v. Random House, Inc., 261 F.Supp. 691, 695 (S.D.N.Y. 1966).<sup>\*</sup> Nor are defendants who merely submit testimony and evidence pertinent to a judicial proceeding subject to liability in an action for defamation. See 1 Seelman, The Law of Libel and Slander in the State of New York 233 ff. (1964).

In addition to the above complete defenses on the merits, the applicable statute of limitations, N.Y.Civ.Prac. L.R. §215(3), would provide an additional bar to Mr. Alexanian's claims, as the acts complained of occurred more than one year prior to December 19, 1975 the date on which this action was filed.

Finally, there simply is no federal jurisdiction, absent diversity of citizenship, of actions sounding in malicious prosecution or defamation. Paul v. Davis, 424 U.S. 693 (1976) (defamation); Heller v. Roberts,

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\* Far from having terminated favorably to plaintiff, the State court proceedings terminated in plaintiff's imprisonment for his contemptuous conduct in willfully disobeying the State court mandate. Medina Affidavit, ¶20-22.

386 F.2d 832 (2d Cir. 1967) (defamation); Yglesias v. Gulf Stream Park Racing Association, Inc., 201 F.2d 817 (5th Cir. 1953) (malicious prosecution). See also, Simmons v. Wetherell, 472 F.2d 509 (2d Cir. 1973) (state court, not federal court, is proper forum for a claim of tortious interference with property rights).

In Paul v. Davis, plaintiff brought a \$1983 action against police chiefs who caused to be distributed a flyer identifying plaintiff and others as "active shoplifters." The Court noted - in language pertinent here - that plaintiff

"pointed to no specific constitutional guarantee safeguarding the [reputational] interest he asserts has been invaded. Rather he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States... [T]he procedural guarantees of the Due Process Clause cannot be the source for such law." 424 U.S. at 700-701.

#### Conclusion

The judgment of the District Court granting defendants-appellees' motion pursuant to Rule 12(b) of



the Federal Rules of Civil Procedure and dismissing  
Mr. Alexanian's complaint should be affirmed.

Dated: New York, New York  
November 16, 1976

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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EDWARD M. ALEXANIAN, :  
 :  
Plaintiff-Appellant, :  
 :  
-against- : Case No.  
 : 76-7338  
NEW YORK STATE URBAN DEVELOPMENT : AFFIDAVIT OF  
CORPORATION, et al., : SERVICE  
 :  
Defendants-Appellees. :  
 :  
----- x

STATE OF NEW YORK )  
 : ss.:  
COUNTY OF NEW YORK )

JOHN ENDICOTT, being duly sworn, says:

I am over the age of eighteen years, am not a party to this action, and on November 16, 1976, I served the annexed brief for defendants-appellees New York State Urban Development Corporation, Edward Logue, Robert McCabe, John Burnett, David Ozerkis, Joseph Fiocca, William Hayden, Robert Hazen, Robert Germano and Philip Salomine, upon the parties by depositing in an official depository of the United States Postal Service, at 26 Broadway, New York, New York, two copies thereof enclosed in a postpaid wrapper addressed (1) to plaintiff-appellant pro se at the following address:

c/o Mrs. Jane M. Alexanian  
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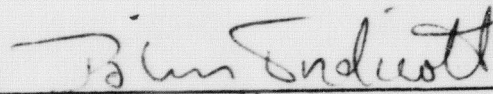
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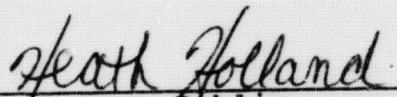
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John Endicott

Sworn to before me this  
16<sup>th</sup> day of November, 1976.

  
Notary Public

HEATH HOLLAND  
Notary Public State of New York  
No. 314629313  
Qualified in New York County  
Commission Expires March 30, 1978